IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPEAL NO.81 OF 1995

Shri Y.O. Shah
Intelligence Officer
Narcotic Control Bureau,
Bombay. ..Appellant
(Org. Complainant)

Vs.

1. Daud Mohamed Patel
2. Ali Ibrahim Patel
3. Mohamed Umarji Patel @ Babubhai
4. Yakub Mohamed Patel
5. The State of Maharashtra ..Respondents
(Nos.1 to 4 original accused)

Mr. D.N. Salvi for Appellant.
The appeal against respondent no.1 was dismissed by order dated 1/2/1999.
Respondent-accused Nos.2 to 4 served.
Mr. A.M. Shringarpure, APP for Respondent No.5-State.

CORAM: S.S. PARKAR & ANOOP V. MOHTA, JJ.

Date : January 19, 2005.

ORAL JUDGMENT : (PER S.S. PARKAR,J.):

1. This appeal is filed by the original complainant against the judgment and order of the Special Judge, Gr. Bombay dated 9/7/1993 acquitting the respondents-accused of the offences under the provisions of NDPS Act and the Customs Act with which they were charged in NDPS Spl. Case No.1225 of 1988.

2. The prosecution case briefly stated is as under :-

. On 16/6/1988 the officers of NCB had received the information that delivery of heroin weighing 2 kgs. would be made in room no.661 of Hotel Taj Mahal at Colaba, Bombay at about 6 p.m. On receipt of the said information, the officers of NCB including Deputy Director R.R. Kakar and Intelligence Officer Yogesh Shah visited room no.661 of Hotel Taj Mahal for the purpose of search of the said room. On reaching Taj Mahal Hotel, they took two panchas which were arranged by security staff of the said hotel. At 6 p.m. they knocked the door of room no.661 which was opened by accused no.1. He was told that they wanted to search the room. After the search was carried out, one black coloured briefcase was found lying on teapoy. The said briefcase was opened by a key produced by accused no.1. On opening the briefcase, two polythene bags containing off-white powder were found. The small quantity of the said powder was tested with the field testing kit. It answered positive for heroin. According to the prosecution case the said briefcase also contained British passport and air ticket in the name of accused no.1. The powder in each polythene bag weighed 1 kg. After mixing the powder, the officer drew five samples of 5 ml.gm. each which were

kept in separate five polythene bags and they were heat sealed. After taking out samples, the two polythene bags with the remaining powder were also heat sealed and put in one carton which was also sealed with NCB seal. The seizure panchanama Exh.14 was drawn, a copy whereof was furnished to accused no.1. Thereafter the accused along with the contraband was taken to the NCB Office, Bombay. Outside the Taj Mahal Hotel accused no.4, brother of accused no.1, on being pointed out by accused no.1, was also apprehended and taken to the office of NCB, Bombay. The statement of accused no.1 was recorded by PW 3 Dy. Director Kakar, in which he had admitted that he had gone to Taj Mahal Hotel to deliver the contraband to one Robert Mathew @ Tony. Statement of accused no.4 was also recorded who admitted to have known about the deal of heroin.

3. Thereafter on 17/6/1988 accused nos.2 and 3 were intercepted near Sagar Hotel, Nagpada by Intelligence Officers. They were brought to the NCB Office at about 10 a.m. on that day and produced before the Dy. Director Kakar, PW 3. He recorded their statements under Section 108 of the Customs Act and under Section 67 of the NDPS Act. All the articles were kept in the cupboard in the NCB Office

under lock and key which was retained by Dy. Director Kakar with himself. On 23/6/1988 one sample was sent to the office of Deputy Chief Chemist, New Customs House, Bombay. The Dy. Chief Chemist has sent report Exh.22 opining that there was presence of Diacetyle Morphine (Heroin) in the sample. One sample was also sent to Chief Chemist, Central Revenue Control Laboratory, New Delhi from where prosecuting agency got report Exh.24, according to which report also there was presence of Diacetyle Morphine in the sample. After completing the investigation and after obtaining requisite sanction, complaint was filed against four accused persons in the Court of Chief Metropolitan Magistrate, Esplanade, Bombay on 29/7/1988 and the case was committed to the Court of Sessions, Bombay on 18/8/1988.

4. Before the Sessions Court charges were framed against the respondents-accused for offences under Section 120-B of I.P.C. read with Section 135-A of Customs Act and under Sections 21, 23, 29, 30 and 8(c) of the N.D.P.S. Act. Alternatively separate charges were framed against accused no.1 only for offences under Sections 21, 30 read with Sections 23 and 8(c) of the N.D.P.S. Act and under Section 135-A of the Customs Act. The accused pleaded not guilty. On

behalf of the prosecution five witnesses have been examined. PW 1 is Yogesh Shah, an Intelligence Officer, who was the member of the raiding party. PW 2 is Aspi Irani, who acted as panch for search and seizure. PW 3 is Deputy Director of NCB Shri R.R. Kakar. PW 4 is Mubarak Karoodia, who was the Supervisor in Sagar Hotel, Nagpada. PW 5 is Vasant Sanchighar, the Asstt. Chemical Examiner who proved the C.A. report. The defence of the accused was of denial. According to accused no.1 one Robert Mathew had telephoned him at Hotel Sagar, Nagpada and asked to see him in room no.661 of Hotel Taj Mahal and, therefore, he had gone to see him there. When the officers of the NCB knocked the door, Robert opened the door and just slipped away and he was surrounded by the persons who introduced themselves as officers of NCB and started beating him and making enquiries and seized his passport and air ticket from his pant pocket. He has further stated that he was physically tortured and threatened by the NCB officers in their office and was forced to write a statement as per the dictation of PW 3 Kakar. So far as respondents, accused nos.2 to 4 are concerned, they have denied that they were party to conspiracy in acquiring or possessing narcotic drugs. According to them their signatures had been obtained by force. Accused No.3

has denied service of summons on him.

5. After considering the entire evidence on record trial court by the impugned judgment and order dated 9/7/1993 has acquitted all the respondents accused of all the charges framed against them. The said order of acquittal is under challenge in this appeal filed by the complainant.

6. The main accused in this case is respondent no.1 - original accused no.1 from whose possession the contraband has been allegedly recovered from the room in Taj Mahal Hotel on 16/6/1988 on the basis of prior information. The other respondents accused had been impleaded by virtue of charge of conspiracy and no contraband was recovered from the possession of any of the respondent nos.2 to 4. So far as the appeal against respondent no.1 - original accused no.1 is concerned, the same had been dismissed by this court by order dated 1/2/1999 for want of prosecution and, therefore, in this appeal we are concerned only with respondent nos.2 to 4 who were impleaded as accused on the charge of conspiracy.

7. It is the case of the prosecution that accused no.2, who is a retired teacher, had procured the

contraband from accused no.3, who is from the State of Madhya Pradesh, for the purpose of supplying the same to accused no.1. So far as accused no.4 is concerned, the only allegation seems to be that he had introduced accused no.2 to accused no.1. Thus, the charge of conspiracy, as against respondent nos.2 to 4, cannot be established unless and until the guilt of accused no.1 is proved and, therefore, though the appeal as against accused no.1 was dismissed, the learned advocate appearing for the complainant had tried to establish the possession of accused no.1 in respect of the contraband. It was fairly conceded on behalf of the complainant that unless the guilt of accused no.1 is established, the accused nos.2 to 4 cannot be held guilty. So far as the charge against accused no.1 is concerned, the trial court has after appreciating the entire evidence on record given finding that the prosecution had failed to prove the possession of accused no.1 in respect of the contraband which was seized from the room of Taj Mahal Hotel.

8. The first hurdle in the way of the prosecution is that there was undoubtedly non-compliance of the provisions of Section 42 of the NDPS Act. Section 42 of the Act mandates that when the authorised officers are acting on the basis of information, gist of the

information must be reduced to writing by the officer who receives the information and copy thereof should be immediately forwarded to the Superior Official. The said requirement is considered to be a necessary safeguard to ensure that false case is not lodged against any person under the provisions of the Act which is attended with sever punishment as the minimum punishment prescribed is 10 years imprisonment and one lakh rupees fine. A perusal of the evidence of PW 1 Intelligence Officer Shah and PW 3 Deputy Director of NCB Kakar shows that the information which was received by PW 3 Kakar was not reduced to writing by him and copy thereof was not sent to his Superior Official. Both the witnesses deposed that the information was received by Kakar pursuant to which he took his junior officers along with him for proceeding to make search and seizure in room no.661 of Taj Mahal Hotel. That factual aspect is not in dispute before us as fairly conceded by Mr. Salvi. It cannot be further disputed that the provisions of Section 42 of the Act are held to be mandatory by the Supreme Court as the said provisions are considered to be a necessary safeguard to ensure that no person is falsely implicated or prosecuted or convicted for the offence under the provisions of the said Act which are attended with severe punishment. In the case of State

of Punjab vs. Balbir Singh reported in **AIR 1994 SC 1872** it has been held that the empowered officer should necessarily take down in writing any prior information given by any person to him and the said provision is mandatory and contravention of the same would affect the prosecution case and vitiate the trial. Similarly, as regards Section 42(2) it has been held that if there is total non-compliance of the said provision, the same affects the prosecution case and to that extent it is mandatory.

9. Mr. Salvi, however, placed reliance on the decision of three Judge Bench of the Supreme Court in the case of Abdul Rashid Ibrahim Mansuri vs. State of Gujarat reported in **AIR 2000 SC 821** and contended that if from the evidence on record the possession and seizure can be proved, the non compliance with Section 42 of the Act will not vitiate the case against the accused. From the perusal of the aforesaid judgment it is quite clear that such contention raised in that case had been rejected. In that case it was contended that as the appellant-accused did not dispute the factum of recovery of charas from his vehicle, it does not matter that the information was not recorded at the first instance by the police officer, which was rejected observing in para 18-19 as follows:-

> "Learned counsel for the State of Gujarat thereupon contended that as the appellant did not dispute the factum of recovery of the "Charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. We cannot approve the contention because non-recording of information has in fact deprived the appellant as well as the Court of the material to ascertain what was the precise information which PW-2 got before proceeding to stop the vehicle. Value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the appellant in the offence, was of a high degree. A criminal Court cannot normally afford to be ignorant of such a valuable information. It is not enough that PW-2 was able to recollect from memory, when he was examined in Court after the lapse of a long time, as to what information he got before he proceeded to the scene."

10. The trial court has otherwise also considered the evidence on record and was not satisfied that the prosecution had proved the possession of accused no.1. The trial court has pointed out that the evidence of PW 4 who was the Supervisor in Sagar Hotel, Nagpada, Bombay shows that between 14/6/1988 and 17/6/1988 accused nos.1 and 4 were residing in room no.201 of Hotel Sagar and, therefore, accused no.1 could not have stationed in Hotel Taj Mahal on 16/6/1988. The prosecution has not also proved that accused no.1 was in occupation of room no.661 of hotel Taj Mahal. The prosecution is, however, relying on the actual

presence of accused no.1 in Taj Mahal Hotel's room and on his confessional statement recorded under the provisions of the Customs and NDPS Act. The trial court has pointed out that PW 3 Kakar has deposed that he had received information on 16/6/1988 about delivery of 2 kgs. of heroin which would be effected in room no.661 of Hotel Taj Mahal. He has further stated that he had received additional information that accused no.1 would be found in that room in Taj Mahal Hotel. PW 3 Kakar has admitted that he did not note down anywhere the said information nor he had any discussion with his officers about the said information and that he was deposing in court as regards the information on the basis of his memory. Significantly the said witness did not state whether he had received any information as to who was to deliver the contraband and who was to receive the delivery of the contraband. As against that PW 1 Intelligence Officer Shah has deposed that he and the other officers were told by R.R. Kakar the Deputy Director that 2 kgs. of heroin was kept in room no.661 of hotel Taj Mahal. The said witness has further stated that from the discussion with R.R. Kakar what he gathered was that on 16/6/1988 2 kgs. of heroin was kept in room no.661 of Taj Mahal Hotel, while Kakar himself has deposed that delivery of 2

kgs. of heroin was to be effected in room no.661 of Taj Mahal Hotel. There was obvious inconsistency between the depositions of these two officers as regards the nature of information received by Kakar. If the information had been reduced to writing, the court would have known about the exact nature of information received by the officer and appreciated the oral evidence. As per the observations of the Supreme Court in the case of Abdul Rashid Ibrahim Mansuri quoted above, a criminal court cannot normally afford to be ignorant of such a valuable information which helps to ascertain the extent of the involvement of the accused in the offence. In the aforesaid case the officer had spoken about the information from his memory as in the present case. There was thus total non compliance of the mandate of Section 42 of the Act as neither sub-section (1) nor sub-section (2) of Section 42 was complied. Unless the information is reduced to writing there is no question of copy of the writing being sent to the Superior Official.

11. The trial court has further pointed out that not only the information received by PW 3 Kakar was not reduced to writing and consequently a copy thereof was not sent to the Superior Official, but the officers had not even made any note or entry in the

office register or anywhere in the office of the NCB, Bombay before or while proceeding for carrying out search and seizure of the narcotic drugs. This is obviously clear from the deposition of PW 1 Intelligence Officer Shah as he had admitted in paragraph 25 of his deposition that he did not make any note in the office before going for search to Hotel Taj Mahal. He has also stated that he did not know whether any other officer had made any note in the office before going to Taj Mahal Hotel on 16/6/1988.

12. The trial court has also pointed out that as per the evidence of PW 1 no enquiries were made by the officers at the reception counter of Taj Mahal Hotel. PW 2 panch witness Aspi Irani has stated in para 25 of his deposition that Duty Manager had given name of Patel as the guest but till the panchanama was recorded he was not knowing that Mr. Patel was the occupant of room no.661. However, in paragraph 9 of his deposition P.W.2 has stated that Duty Manager in the Lobby of Taj Mahal Hotel by name Mr. Robert had told the panchas that the officers had information that guest by name Patel was staying in room no.661. The evidence of Intelligence Officer PW 1 Shah is otherwise and there is no such mention in the seizure

panchanama Exh.14. PW 1 Shah has categorically stated that he did not know the name of accused no.1 when suggestion was put to him that after the opening of the door some person from that room went out.

13. The trial court has also referred to the evidence of Intelligence Officer who had deposed that neither officers had searched the panchas nor the panchas had searched the officers and they had not offered personal search to the accused. But PW 2 panch in para 12 of his deposition has deposed that no personal searches were offered to them though there is mention about it in the panchanama. The trial court has also referred to the seizure panchanama Exh.14 where there is no reference to the fact that the briefcase was lying on a teapoy which was having lock and key system and it was opened by a key produced by accused no.1, though it is so stated by panch witness. Significantly, neither the briefcase nor the key of the briefcase produced allegedly by accused no.1 has been seized. PW 1 had admitted that he had not taken charge of the briefcase nor of the key of the briefcase. It is important to note that the panchanama does not even mention that the said briefcase and the key were returned to accused no.1 nor there is any receipt produced by the prosecution

from accused no.1 for having returned the briefcase to him. The panchanama also does not mention that the said briefcase had lock and its key was produced by accused no.1. In view of the aforesaid position the trial court was right in holding that otherwise also the possession of accused no.1 in respect of contraband was not proved beyond reasonable doubt. Here lies the importance of reducing the information to writing and sending copy thereof immediately to the Superior Official to ensure that such information was received pursuant to which seizure was made. The trial court, therefore, has doubted whether the briefcase in question belonged to accused no.1. The said omissions have to be considered in the light of the fact that room no.661 in Hotel Taj Mahal was booked in the name of Robert Mathew @ Tony who must have slipped away from there when the officers entered the room. But according to the officers accused no.1 was in occupation of the room though according to the prosecution case the record of Taj Mahal Hotel shows that Robert Mathew @ Tony had checked out from that room at 6.15 p.m. or so.

14. Even PW 2 panch Irani in paragraph 13 of his deposition has stated that he did not see any personal search of accused no.1 being taken by the officer nor

he remembered to have read in the panchanama that officers had enquired from accused no.1 about the ownership of the heroin. In view of the above the trial court has not accepted the prosecution case that the contraband and the documents, namely, passport and air ticket were recovered from the briefcase of accused no.1 and key of the briefcase was produced by accused no.1. As per the defence of accused no.1 his passport and air ticket were not in the briefcase but they were with him and were seized from his person.

15. Mr. Salvi, however, relies strongly on the statement of the accused no.1 and contends that in view of the statement of accused no.1, which is admissible in evidence, the prosecution can be said to have proved the possession of accused no.1. The trial court has referred to the several judgments of the apex court in which it is held that conviction cannot be based solely on the retracted confession of the accused unless it is substantially corroborated by independent circumstances. No circumstances have been pointed out on behalf of the prosecution which corroborate the confessional statement of the accused which was retracted earlier as well as at the trial.

16. There is absolutely no evidence of conspiracy

against respondent nos.2 to 4 with whom we are concerned in this appeal. The only material relied on behalf of the prosecution against these respondents is their confessional statements recorded under Section 67 of the NDPS Act. It is not in dispute that all the respondents had retracted from their confessions and, therefore, they cannot be the sole basis of conviction. The prosecution has to bring material on record from which inference at least of conspiracy could be drawn against the respondents-accused. Since the guilt of the main accused no.1 is not proved the charge of conspiracy cannot be said to have been proved against respondent nos.2 to 4. In our view there is absolutely no material brought on record to prove the charge of conspiracy against respondent nos.2 to 4. For non compliance of the mandatory provisions under Section 42 of the Act, the trial itself, against all the respondents-accused, is vitiated. Even otherwise also assuming that the possession of accused no.1 can be said to have been proved by the prosecution, there is no material brought on record by the prosecution with regard to the charge of conspiracy against respondent nos.2 to 4. The reliance is placed by the prosecution only on the retracted confessions of respondent nos.2 to 4. It is well settled that the retracted confession must

be corroborated in material particulars before basing conviction of the accused on such a retracted confession. The trial court has referred to the judgment of the apex court in this regard and the law is well settled for over a period of more than four decades that retracted confession cannot be the basis of conviction unless corroborated in material particulars. The case of the prosecution against accused no.4 seems to be that he was knowing about the deal of accused no.1 and he had introduced accused no.2 to his brother accused no.1, who had supplied contraband to accused no.1. In view of the aforesaid discussion we have no hesitation in confirming the order of acquittal of respondent nos.2 to 4 i.e. original accused nos.2 to 4.

17. In the result, we confirm the order of acquittal recorded by the Special Judge, Gr. Bombay in NDPS Special Case No.1225 of 1988 on 9/7/1993 against respondent nos.2 to 4 - original accused nos.2 to 4 and dismiss the appeal against them. The bail bonds of respondent nos.2 to 4 shall stand cancelled.

(S.S. Parkar, J.)

(Anoop V. Mohta,J.)